

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1029

To be argued by
RHEA KEMBLE NEUGARTEN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1029

UNITED STATES OF AMERICA,
Appellee,

—v.—

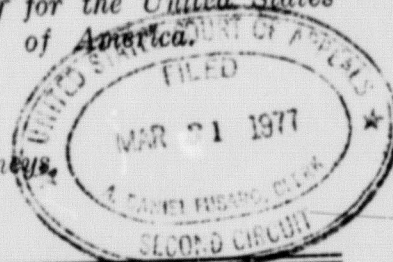
SANTOS PETRUCELLI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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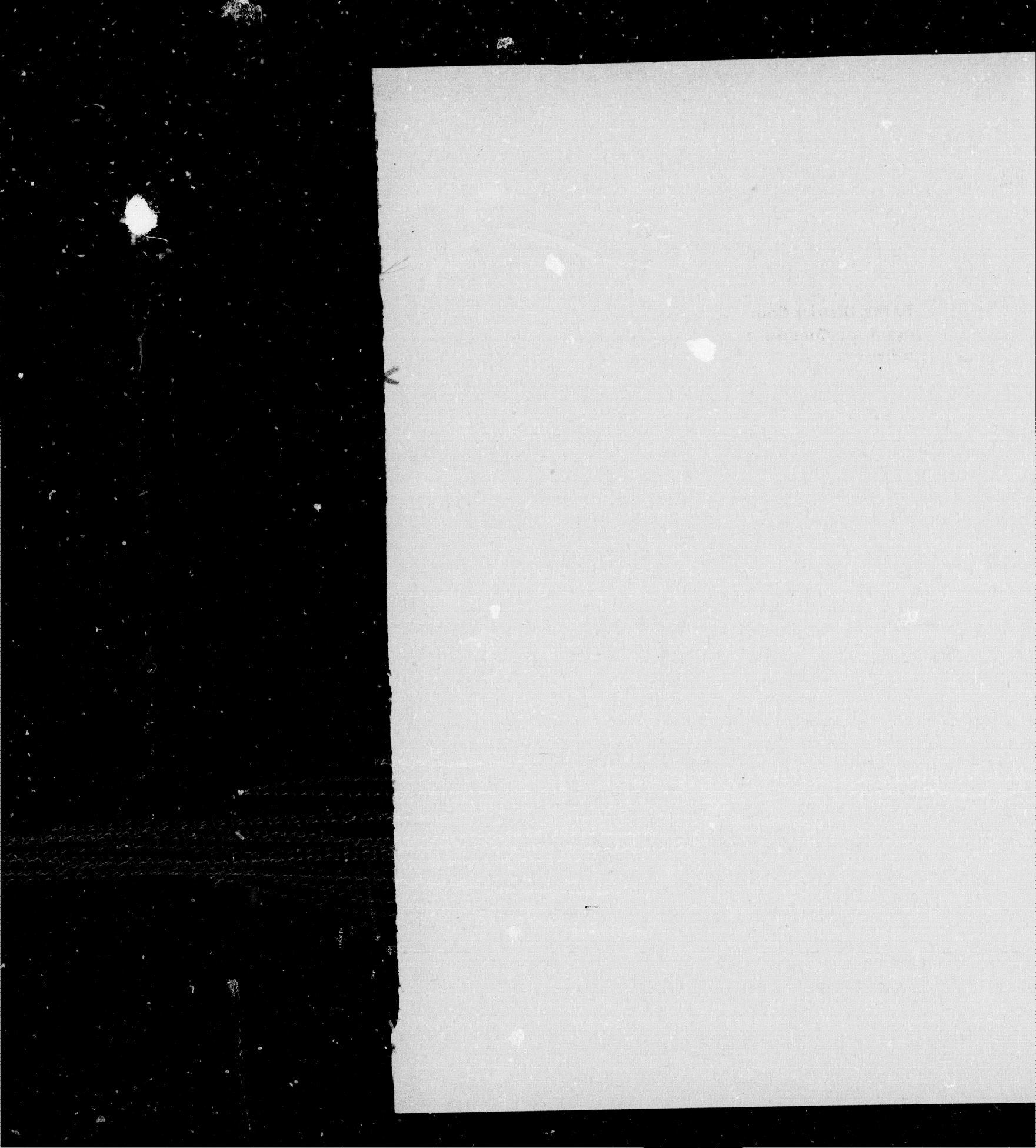


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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Santos Petrucelli appeals from a judgment of conviction entered on January 4, 1977, modifying an earlier judgment entered on September 21, 1976, after a two-day trial before the Honorable Henry F. Werker, United States District Judge, and a jury.

Superseding indictment S 76 Cr. 371, filed on August 13, 1976, charged Petrucelli with three counts of using threats of force to endeavor to intimidate and impede an Internal Revenue Service employee while such employee was acting in an official capacity and to obstruct and impede the due administration of the federal tax laws, in violation of Title 26, United States Code, Section 7212(a).

Trial commenced on August 24, 1976, and continued until the next day, August 25, 1976, when the jury re-

turned a verdict of guilty on the first count, and acquitted Petrucelli on the third count.*

On September 21, 1976, pursuant to Title 18, United States Code, Section 4205(c) and (d), Judge Werker committed Petrucelli to the custody of the Attorney General for study, such commitment having been deemed to be for the maximum sentence—in this case one year—, with the results of the study to be furnished to the court within three months. After receiving the report of that ordered study, Judge Werker on January 4, 1977, suspended the execution of the remainder of the sentence and placed the defendant on probation for three years, with the requirement that he attend a mental health clinic as directed by the Probation Department.

Statement of Facts

The Government's Case

On March 18, 1976, Santos Petrucelli made an anonymous threatening telephone call to an Internal Revenue Service ("IRS") Revenue Officer who for several months had been trying to collect past due taxes from him. The jury apparently rejected defense counsel's argument that the call was not designed to intimidate the Revenue Officer, but rather was simply a non-malevolent way of letting off steam, and convicted as to that call. By contrast, the jury acquitted on a count based on comments made by Petrucelli in a subsequent telephone call that IRS investigators had instigated.

* On August 24, 1976, Judge Werker granted Petrucelli's motion to dismiss the second count of the indictment.

A. The tax background

In early 1974, Santos Petrucelli filed his 1973 tax return dated February 25, 1974 (GX 1A, 1B; Tr. 14).^{*} That return claimed substantial, non-itemized deductions for travel and business expenses, against a small personal income.

IRS Tax Auditor Angelo Chiapperino was assigned to audit Petrucelli's 1973 tax return. (Tr. 16). When Petrucelli failed to respond to Chiapperino's letters asking that he document the deductions and appear for an appointment (Tr. 14-21; See GX 2, 3, 4, 5), Petrucelli was notified that because the deductions were disallowed, he would have to pay additional taxes. (Tr. 18-21; GX 6A, 6B). Although Petrucelli was mailed notice that he had a right to petition to the Tax Court (Tr. 22-23; GX 7A, 7B, 7C and 7D), he filed no petition, and the 1973 tax deficiency became final in the spring of 1975. (Tr. 24, 25, 27).

Thereafter, collection of Petrucelli's additional 1973 taxes was assigned to Revenue Officer Joseph Tacopina in August 1975. (Tr. 30). By that time, the amount due had been reduced because the 1974 tax rebate that Petrucelli would otherwise have received along with most other taxpayers, had instead automatically been applied by the IRS toward payment of the 1973 taxes. (Tr. 40-41). Revenue Officer Tacopina made various efforts to contact Petrucelli, including visiting the tax preparation service that had prepared the 1973 return, checking with local banks, and sending out postal tracers. (Tr. 30-31). Eventually Tacopina obtained a current address for Petrucelli, and sent him a letter again informing him of

^{*} The abbreviation "Tr." refers to the trial transcript; "GX" refers to Government Exhibits; and "Br." to Petrucelli's brief.

the amount of taxes due and requesting him to pay the amount. (Tr. 31-32; GX 9). Revenue Officer Tacopina included his office telephone number in that letter. (Tr. 32; GX 9).

While Petrucelli did not in any way respond to the invitation to pay the past due taxes, he did send Tacopina a letter dated October 18, 1975, telling him to send the "check" that Petrucelli was apparently expecting as a refund in connection with his 1975 taxes, to Petrucelli in care of either the Brazilian Embassy in Moscow or the American Embassy in Brazil. (Tr. 33-34; GX 10A).

Tacopina persisted. He continued to try to find Petrucelli's assets, by contacting former employers and banks, but without any success. (Tr. 34-35). However, just as Tacopina was preparing to suspend the search, the account was settled by the automatic application of Petrucelli's expected 1975 tax refund to the open 1973 tax liability. (Tr. 35-36; GX 11).

B. The Anonymous Call To Tacopina

The computer credited Petrucelli's account in early March 1976 (Tr. 36), and on March 18, 1976, Tacopina received an anonymous telephone call from a voice he later identified as that of Petrucelli. (Tr. 39, 62). Prior to that time, Tacopina had never met or talked to Petrucelli, and had had no contact with him except in connection with the collection of taxes. (Tr. 36).

The call came in on the telephone line the number of which Tacopina had provided in the letter to Petrucelli. (Tr. 37; GX 9). In what Tacopina described as a "very controlled" voice (Tr. 45), Petrucelli first badgered Tacopina about the activities of the Esso Oil Company in Brazil, mentioned other matters, and referred to a Mrs. Wilson, who Petrucelli described as a black colleague of

Tacopina. (Tr. 37). Finally, Petrucelli asked Tacopina how he would like a punch, and told him that "the blacks were going to get [Tacopina, that] they knew where [he] lived, and that they would be there." (Tr. 38). Tacopina concluded he was being told that, as he put it, his "number was up". (*Id.*).

In addition to Tacopina's subsequent identification of an exemplar of Petrucelli's voice as the voice in the anonymous call, other evidence connected the call to Petrucelli. Tacopina had thought the caller had a Spanish sounding accent, but also used Slavic sounding words and referred to Brazil. (Tr. 37-38). Petrucelli's resume (GX 17) revealed that he was Brazilian, spoke Spanish, English and Portuguese well, and also was learning Russian. Moreover, when arrested, Petrucelli revealed that he had had dealings with a Mrs. Wilson in the IRS. (Tr. 67). Indeed, even the expression "a punch" was characteristic of Petrucelli, who in the later taped telephone conversation indicated that to him "a punch" was synonymous with serious injury.* Petrucelli's resume revealed that he was in fact highly educated, and had had extensive international business experience. (GX 17).

Moreover, while Tacopina had asked the anonymous caller who he was and what he wanted—apparently in an attempt to draw him out—there is no indication that Tacopina was in fact in any doubt as to who the caller was. Both the references to Brazil and the Slavic sounding words pointed to the letter from Petrucelli, which had

* Petrucelli is making a copy of the transcript of the recorded conversation (GX 16) a part of the record in this Court. (Br. 5). While the jury acquitted Petrucelli of the charge that the comments in that call violated the law, Petrucelli did not seriously contest that it was in fact his voice on the tape and that the comments were his. Hence the verdict as to Count Three, which concerned that call, does not require that the contents of the taped call be disregarded in evaluating the earlier anonymous call.

mentioned that he might be contacted through the Brazilian Embassy in Moscow. Even the reference to Esso was consistent with the letterhead used by Petrucelli, which had described Petrucelli as an "International Economics Counselor". (GX 10A).

C. The Second Anonymous Call

A few hours later on March 18, Petrucelli made another anonymous call to the IRS offices in Manhattan. When Petrucelli asked for Tacopina, he was informed that Tacopina was not there at that time. (Tr. 47). Petrucelli then told Revenue Officer Edward McPhail, who had answered the telephone, that the government was persecuting Mexicans and South Americans and that if the government did not change its ways, a bomb would be placed in the building. (Tr. 47, 50-51). McPhail later identified an exemplar of Petrucelli's voice as that of the anonymous caller. (Tr. 49, 62). Until March 18, McPhail had never talked to Petrucelli. (Tr. 49).

Because the trial judge found that the remarks about persecution were not connected to the collection of taxes and were not made to Tacopina, Count Two (which referred to the McPhail call) was dismissed at the end of the government's case. (Tr. 75).

D. The Recorded Conversation

Presumably in order to obtain a voice exemplar, on March 31, 1976, IRS Inspector Thomas Santiago placed a telephone call to Petrucelli at his home. (Tr. 53-55). That call was recorded with Santiago's consent. (Tr. 56). A transcript of the conversation was received in evidence

(Tr. 58; GX 16), and the recording of the call was played for the jury. (Tr. 59). In the course of this conversation, Petrucelli made various political statements and complained of American actions in Brazil and actions against Brazilians in the United States, as well as disparaging treatment that he had personally received. In discussing the probable consequences of these "wrongs", Petrucelli used the word "punch" to refer to a serious beating.* He also contended that Tacopina would "pay with blood" for his actions in collecting Petrucelli's taxes. (GX 16 at 20, 23).

Portions of the tape of this call were played for Tacopina and McPhail, both of whom identified the voice on the tape as that of the anonymous caller. (Tr. 39, 49, 61, 62). By convicting as to Count One, the jury must have concluded that it was Petrucelli's voice in the recorded call. However, the jury apparently declined to accept the government's contention that the content of Petrucelli's remarks in that pretext call violated the law, and accordingly acquitted on Count Three.

The Defendant's Case

Mr. Petrucelli did not testify and the defense presented no evidence.

* At one point Petrucelli said "They are going to punch the face of your people in, in Brazil the Brazilians punch very strongly, you don't know the military in Brazil, they punch, they beat like crazy. . ." (GX 16 at 12).

ARGUMENT

Petrucelli Endeavored To Intimidate Revenue Officer Tacopina In Connection With Tacopina's Official Duties.

Petrucelli's contention that the government had to prove that Petrucelli was endeavoring to obstruct and impede the due administration of the income tax laws as an ongoing matter is without merit. By its terms, Section 7212(a) of Title 26 is designed both to protect IRS personnel from threats in connection with their official duties *and* to prohibit interference with the administration of the tax laws. Thus, it is a crime to endeavor, by threat of force *either* "to intimidate or impede any officer or employee of the United States acting in an official capacity [under Title 26]" *or* "to obstruct or impede the due administration [of Title 26]." 26 U.S.C. § 7212(a). Only one of these two alternative elements need be proven. In this respect Section 7212 is like the general statute prohibiting assaults on federal officers (18 U.S.C. § 111), which the Supreme Court has held is designed "to protect *both* federal officers and federal functions". *United States v. Feola*, 420 U.S. 671, 679 (1975) (emphasis added). Indeed, Congress intended Section 7212(a) to be even broader than § 111. See Sen. Rept. No. 1622, 1954 U.S. Code Cong. and Adm. News 4621, 5424. As this Court has recently noted, "The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive as [appellant's] indictment did, the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *United States v. Droms*, Dkt. No. 76-1232, slip op. 2035, 2037-38 (2d Cir., February 25, 1977), quoting from *Turner v. United States*, 396 U.S. 398, 420 (1970). Thus the fact the Petrucelli's account had al-

ready been settled by the time he made the March 18, 1976 call to Tacopina is of no legal consequence.

Even if a nexus with the obstruction of the administration of the tax laws were required, that test was met here. The statute makes it a crime to *endeavor* to do certain things. It does not matter whether the act was capable of completion. See *United States v. Sciolino*, 505 F.2d 586, 589 (2d Cir. 1974). In this case Petrucelli may have thought that by intimidating Tacopina, Petrucelli would be able to reverse the application of the refund to the past due 1973 taxes, and thus obtain the refund. Nor is there any indication that Petrucelli had been notified that his account had been fully settled; he may still have thought further proceedings would be undertaken. Hence Petrucelli was in a position to *endeavor* to obstruct the administration of the tax laws.

Nor does the fact that the collection of taxes was not referred to in the call render the threats anything other than in connection with Tacopina's "official capacity." Petrucelli had had no other contact with Tacopina *except* in connection with the tax matter. (Tr. 36). And the "Mrs. Wilson" to whom Petrucelli referred was someone whom he later admitted he had had dealings with at the IRS. (Tr. 67).

That Petrucelli intended a threat of force is also indisputable. The fact that the threat was "non-specific", "non-direct" or "implied" does not make it any less culpable. See *United States v. Sciolino*, *supra*, 505 F.2d at 588. Nor does it matter that the threat was that "the blacks", rather than Petrucelli himself, would use force. The law is violated even if the threat is that someone other than the defendant will use force against the threatened person. Cf. *United States v. Quintana*, 457 F.2d 874, 876-77 (10th Cir.), *cert. denied*, 409 U.S. 877 (1972) (construing an analogous statute, 18 U.S.C. § 894). Nor is it necessary to prove that Petrucelli intended to carry out the threat. *United*

States v. Compton, 428 F.2d 18, 22 (2d Cir. 1970), *cert. denied*, 401 U.S. 1014 (1971) (construing an analogous statute, 18 U.S.C. § 871).

Nothing explains Petrucelli's telephone call except the recognition that he intended to intimidate Tacopina because of what Petrucelli saw as Tacopina's actions in collecting the 1973 taxes. Whether *Tacopina* actually perceived the call in that fashion is irrelevant, once it is established that a "reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm" *United States v. Compton*, *supra*, 428 F.2d at 21, quoting *Roy v. United States*, 416 F.2d 874, 877-78 (9th Cir. 1969). *Cf. United States v. Natale*, 526 F.2d 1160, 1168 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976) (construing analogous statute 18 U.S.C. § 894). Because Petrucelli was an educated man, whose mental state was found satisfactory (Tr. 154), his intentions were manifest.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

Rhea Kemble Neugart being duly sworn,
deposes and says that *S* he is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the *31st* day of *March*
S he served *2* copies of the within *Brief*
by placing the same in a properly postpaid franked
envelope addressed:

Howard L. Jacobs, P.C.
401 Broadway
New York, N.Y. 10013

An deponent further says that *S* he sealed the said
envelope and placed the same in the mail chute drop for
mailing at One St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Rhea Kemble Neugart

Sworn to before me this

31st day of *March, 1977*

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978